



Federal Communications Commission
Washington, D.C. 20554

May 12, 2017

By U.S. Mail and Electronic Mail:

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RE: FCC FOIA Control No. 2017-000465; WT Docket No. 12-202

Dear Mr. Olcott and Mr. Johnston:

For the reasons stated below, the Mobility Division (Division) of the Wireless Telecommunications Bureau hereby grants the request of Progeny LMS, LLC (Progeny) for confidential treatment of certain redacted information contained in the First Progress Report of Progeny LMS, LLC (First Progress Report).¹ We also deny the related request of PCS Partners, L.P. (PCSP) under the Freedom of Information Act (FOIA) to examine the redacted information, that was filed in FOIAonline and the Electronic Comment Filing System (ECFS) on March 17, 2017, received by the Federal Communications Commission (Commission or FCC) FOIA Staff and perfected on March 20, 2017, and assigned FCC FOIA Control Number 2017-000465.²

Background. Progeny filed a public version of its First Progress Report in ECFS on March 1, 2017, which was accompanied by the Confidentiality Request and withheld all information aside from the title and date of the report.³ On March 17, 2017, PCSP filed a FOIA request, requesting "immediate access" to the First Progress Report.⁴ Progeny responded on April 10, 2017, opposing PCSP's FOIA

¹ See Letter from Bruce A. Olcott, counsel to Progeny, to Marlene H. Dortch, Secretary, Federal Communications Commission (Mar. 1, 2017) (on file in WT Docket No. 12-202) (Confidentiality Request).

² See Letter from E. Ashton Johnston, counsel to PCSP, to Marlene H. Dortch, Secretary, FCC (Mar. 17, 2017) (on file in WT Docket No. 12-202) (FOIA Request). PCSP consented to an extension of time in this matter until May 12, 2017.

³ By the terms of the Division's recent order granting to Progeny waiver relief and an extension of time to meet the construction deadlines for certain of its Multilateration Location and Monitoring Service (M-LMS) licenses, Progeny is required to file various reports in the docket, such as the First Progress Report. *Request of Progeny LMS, LLC for Waiver and Limited Extension of Time*, Order, 32 FCC Rcd 122, 11138-39, para. 35 (WTB Mobility Div. 2017).

⁴ FOIA Request at 1.

Request in part and voluntarily submitting a redacted version of its First Progress Report.⁵ PCSP filed a letter response in ECFS, continuing to seek a determination from the Commission as to whether the redacted material satisfies the standard for non-disclosure under Exemption 4.⁶ In order to have a complete record, we accept the PCSP Response in determining whether the redacted material is properly withheld under Exemption 4.

Discussion. Progeny states that it seeks confidential treatment for the remaining redacted material in the First Progress Report, stating that it discloses information about the technology it is using in its M-LMS network, its activities with potential customers, as well as its current relationships with suppliers and vendors.⁷ Progeny asserts that the redactions contain highly sensitive commercial and technical information regarding an extremely competitive market,⁸ and claims that the release of such information could harm the company “because it could eliminate its competitive advantage.”⁹ Based on the foregoing, Progeny asserts that the redacted information is exempt from disclosure under FOIA Exemption 4.¹⁰ Exemption 4 protects from disclosure “commercial or financial information obtained from a person [that is] privileged or confidential.”¹¹ PCSP initially opposed confidential treatment of the entire report.¹² PCSP argues that, on the face of the Confidentiality Request, none of the information appeared to fall within the list of materials that are not routinely available for public inspection,¹³ that Progeny fails to provide a factual basis for withholding pursuant to Exemption 4, and that any information which is public should be disclosed.¹⁴ PCSP seeks a ruling regarding whether non-disclosure of the remaining redacted material is warranted under Exemption 4.¹⁵

Confidentiality Request. To come within the scope of Exemption 4, the redacted information must contain trade secrets or, in the alternative, should the information not fit the courts’ narrow definition of trade secrets as being limited to the “productive process,”¹⁶ the information must be commercial or financial in nature and either “privileged or confidential.”¹⁷ The FOIA was recently amended to codify the presumption in favor of disclosure; however, if the agency reasonably foresees that disclosure would harm an interest protected by Exemption 4, withholding information is permitted.¹⁸ Agencies are also required to consider whether partial disclosure of information is possible and to take reasonable steps so that nonexempt information can be segregated and released.¹⁹

⁵ Letter from Bruce A. Olcott, counsel to Progeny, to Lloyd W. Coward, Deputy Chief, Mobility Division (Apr. 10, 2017) (on file in WT Docket No. 12-202) (Progeny Response).

⁶ Letter from E. Ashton Johnston, counsel to PCSP, to Marlene H. Dortch, Secretary, FCC (Apr. 20, 2017) (on file in WT Docket No. 12-202) (PCSP Response).

⁷ Progeny Response at 2.

⁸ Confidentiality Request at 2; Progeny Response at 2.

⁹ Progeny Response at 2.

¹⁰ Confidentiality Request at 2; *see also* Progeny Response at 1.

¹¹ 5 U.S.C. § 552(b)(4). *See National Parks & Cons. Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

¹² FOIA Request at 1.

¹³ *See* 47 CFR § 0.457(d)(1)(i)-(ix).

¹⁴ FOIA Request at 2-3.

¹⁵ PCSP Response.

¹⁶ *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

¹⁷ 5 U.S.C. § 552(b)(4).

¹⁸ 47 U.S.C. § 552(a)(8)(A)(i)(I).

¹⁹ 47 U.S.C. § 552(a)(8)(A)(ii).

Under Exemption 4, “commercial” information includes anything “pertaining or relating to or dealing with commerce.”²⁰ Courts have considered types of information divulging business or marketing strategies that could enable competitors to devise counterstrategies as involving a competitive harm.²¹ Actual competitive harm need not be demonstrated so long as evidence of “actual competition and a likelihood of substantial competitive injury” is shown.²² In *National Parks*, the U.S. Court of Appeals for the District of Columbia Circuit determined that commercial information is “confidential” where its disclosure is likely “to cause substantial harm to the competitive position of the person from whom the information was obtained.”²³

We have carefully reviewed the redacted portions of the First Progress Report and considered the parties’ respective arguments in this matter. We find that the redacted portions are protected from disclosure under Exemption 4. Because release of the redacted information could foreseeably cause competitive harm to Progeny, we find that disclosure of any of the redacted information is not possible here. Our analysis below corresponds to the organization of the First Progress Report, which contains an introductory paragraph and four sections.

First Progress Report, Introductory Paragraph.

1. Page 1, introductory paragraph. This paragraph, which recites the general bases for the Confidentiality Request, was voluntarily disclosed by Progeny in full.

First Progress Report, 1. A demonstration of its substantial progress toward bringing compatible handsets to market.

2. Page 1, paragraphs 2 and 3. These paragraphs contain information regarding Progeny’s efforts to develop equipment through vendor and supplier relationships. Although the redacted text discusses Progeny’s technology and its efforts to develop equipment, these details do not describe a proprietary process that would constitute a trade secret under the FOIA statute. However, all of the redacted information is commercial, and due to the competition in the wireless location services market following the Commission’s latest order specifying wireless indoor location accuracy requirements,²⁴ we foresee how release of this information could be used by competitors to undermine Progeny’s business relationships, placing Progeny at a competitive disadvantage. Therefore, all redactions in paragraphs 2 and 3 are protected from disclosure under Exemption 4.

First Progress Report, 2. Identification of the carriers(s) Progeny will provide service to and a detailed plan for site deployment, testing, and activation in each license area.

3. Pages 1 through 2, paragraphs 4 and 5. These paragraphs contain information regarding Progeny’s efforts to test and develop its technology in partnership with certain carriers, as well as a

²⁰ *Am. Airlines, Inc. v. Nat’l Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978).

²¹ *Western Union Telegraph Co.*, Memorandum Opinion and Order, 2 FCC Rcd 4485, 4487, para. 13 (1987).

²² *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 & n.158 (D.C. Cir. 1987) (reiterating “policy behind Exemption 4 of protecting submitters from external injury”).

²³ *National Parks*, 498 F.2d at 770. The Commission’s rules explicitly list certain types of materials in the category of trade secrets and commercial and financial information that are automatically afforded protection from public inspection. See 47 CFR § 0.457(d)(1).

²⁴ See *Wireless E911 Location Accuracy Requirements*, Fourth Report and Order, 30 FCC Rcd 1259 (2015); see also 47 CFR § 20.18.(i)(3)(i).

description of the current status of Progeny's testing and deployment plans. Because paragraph 5 does not contain any redactions, our analysis here pertains only to paragraph 4. Release of the redacted text in paragraph 4—which contains sensitive details regarding Progeny's efforts to commercialize its technology and its confidential arrangements with other business entities—could foreseeably cause Progeny competitive harm, given the insight this information permits a competitor into Progeny's technical progress and its business relationships. We therefore find that all redactions in paragraph 4 are protected from disclosure under Exemption 4.

First Progress Report, 3. The date on which it commenced testing in the Indoor Location Accuracy Test Bed and, if applicable, the date testing was completed and certification was received from the Test Bed Administrator.

3. Page 2, paragraphs 6 through 8. Only paragraph 7 has partial redactions; paragraphs 6 and 8 were voluntarily disclosed by Progeny in full, and are not included in the following analysis. Paragraph 7 provides details of the testing process, including a specific description of the test device and of the coordination process involved. Again, although the device described does not meet the narrow definition of a proprietary process, and thus information related to it cannot properly be withheld under Exemption 4 as a trade secret, the redactions involving the device and coordination process are commercial. Moreover, we foresee how disclosure of this commercial information could cause competitive harm to Progeny if a competitor were to use this technical information to gain an edge in the wireless location services market. We find that this commercial information could be used to the competitive disadvantage of Progeny and therefore protect the redactions in paragraph 7 from disclosure under Exemption 4.

First Progress Report, 4. Other information relevant to the development of the Company's wireless location service.

4. Pages 2 through 3, paragraphs 9 through 11. Paragraphs 9 and 11 discuss Progeny's activities regarding potential government customers; paragraphs 10 and 11 specifically describe Progeny's technology. Progeny seeks to withhold this information under Exemption 4 stating that it contains trade secrets and commercially sensitive information related to customer relationships. None of the redacted information describes a proprietary process, and thus it fails to qualify for trade secret protection under Exemption 4.

We note that a limited amount of the redacted text contains commercial information that is publicly available. However, disclosure of the public information here could cause competitive harm to Progeny in two respects. First, we cannot reasonably segregate and disclose the public information without providing a reader context to understand other redacted content that contains sensitive competitive information regarding Progeny's efforts to commercialize its technology.²⁵ Second, regardless of the other information in Progeny's First Progress Report, releasing the public information here emphasizes its strategic importance and would likely enable a competitor to deduce key elements of

²⁵ Courts have upheld protection under Exemption 4 for public information embedded in sensitive commercial information when the revelation of the public information, if cross-referenced or combined with other contextual information available to competitors, would elevate the likelihood of competitive injury. *See Customs and Int'l Trade Newsletter v. U.S. Customs and Border Patrol*, 588 F. Supp. 2d 51, 57 (D.D.C. 2008) (requested information could allow competitor to steal business away from or disrupt the business of its rivals; contours of FOIA request also prevented agency from segregating information in a way that would eliminate the likelihood of competitive injury).

Progeny's business plans.²⁶ In either case, because release of any of the information in these paragraphs could provide a competitor with a significant commercial advantage, we foresee that disclosure of this redacted information could competitively harm Progeny. Thus, we find that all of the commercial information redacted in paragraphs 9, 10, and 11 is protected from disclosure under Exemption 4.

Conclusion and Right to Appeal. For the reasons stated above, we grant the request of Progeny LMS, LLC for confidential treatment of the redacted portions of the First Progress Report of Progeny LMS, LLC, and consequently deny the request of PCS Partners, L.P. for release of the redacted information under the Freedom of Information Act.

We are required by both the FOIA and the Commission's own rules to charge requesters certain fees associated with the costs of searching for, reviewing, and duplicating the sought after information. To calculate the appropriate fee, requesters are classified as: (1) commercial use requesters; (2) educational requesters, non-commercial scientific organizations, or representatives of the news media; or (3) all other requesters.

Pursuant to Section 0.466(a)(4) of the Commission's rules, PCSP has been classified as category (1), "commercial use requesters."²⁷ As a "commercial use requester," the Commission assesses charges to recover the full direct cost of searching for, reviewing, and duplicating the records sought.²⁸ In this case, we completed our work to date without releasing any records or needing to search and review our records. Accordingly, no fee is being charged to PCSP.

PCSP may seek review of the denial of its FOIA request by filing an application for review with the Office of General Counsel. An application for review must be received by the Commission within 90 calendar days of the date of this letter. PCSP may file an application for review by mailing the application to Federal Communications Commission, Office of General Counsel, 445 12th St SW, Washington, DC 20554, or you may file your application for review electronically by e-mailing it to FOIA-Appeal@fcc.gov. Please caption the envelope (or subject line, if via e-mail) and the application itself as "Review of Freedom of Information Action" and reference FCC FOIA Control Number 2017-000465.

If you would like to discuss this response before filing an application for review to attempt to resolve your dispute without going through the appeals process, you may contact the Commission's FOIA Public Liaison for assistance at:

FOIA Public Liaison
Federal Communications Commission, Office of the Managing Director, Performance Evaluation
and Records Management
445 12th St SW, Washington, DC 20554
202-418-0440
FOIA-Public-Liaison@fcc.gov

If you are unable to resolve your FOIA dispute through the Commission's FOIA Public Liaison, the Office of Government Information Services (OGIS), the Federal FOIA Ombudsman's office, offers

²⁶ *Id.*

²⁷ 47 CFR § 0.466(a)(4).

²⁸ 47 CFR § 0.470(a)(1).

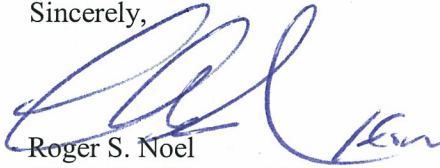
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mediation services to help resolve disputes between FOIA requesters and Federal agencies. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740-6001
202-741-5770
877-684-6448
ogis@nara.gov
ogis.archives.gov

If you have any questions regarding the foregoing, please call or email Richard Arsenault, Chief Counsel, Mobility Division (202-418-0920, richard.arsenault@fcc.gov).

Sincerely,

A handwritten signature in blue ink, appearing to read "R. Noel", is written over the printed name.

Roger S. Noel
Chief, Mobility Division
Wireless Telecommunications Bureau